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IN THE UNITED STATES DISTRICT COURT  
FOR THE TERRITORY OF GUAM

UNITED STATES OF AMERICA, ) CRIMINAL CASE NO. 08-00004

Plaintiff,

VS.

**UNITED STATES' MEMORANDUM  
CONCERNING THE  
UNAVAILABILITY OF A WITNESS**

EUN YOUNG LEE,  
aka Eun Young Cho,

aka Ina Lee,  
MARCELINO J. LASE

JOHN W.C. DUENAS,

MARY C. GARCIA,

MARY J. STRECK,  
JOSEPH PANGELINA

**JOSEPH H. KINGELLY JR.,  
FRANCISCO SN KAWA**

FRANCISCO S. KIWAMOTO, and  
MARGARET B. UNTALAN

MARGARET B. CRAVEN,

## Defendants.

FBI Special Agent Kline, after testifying extensively on direct examination, has become unavailable for cross-examination. The government believes that, given the huge investment of time and money in this trial, that this Honorable Court instruct the jury to disregard Agent's Kline's testimony, and allow the other agents who were present during the interviews he conducted, to testify. The alternative is to declare a mistrial, which the government opposes.

This subject is generally addressed in 22 C.J.S. Criminal Law § 293. "Manifest necessity for a mistrial exists, for the purposes of determining whether a retrial would violate the constitutional prohibition against double jeopardy, when the accused's right to have the trial

1 completed by a particular tribunal is subordinate to the public interest in affording the prosecutor  
2 one full and fair opportunity to present evidence to an impartial jury, and the trial court has broad  
3 discretion in deciding whether to grant a mistrial.”

4       Ordinarily, if a case is dismissed after the jury is empaneled, jeopardy attaches unless the  
5 defendant consents to the mistrial, or the district court determines that the mistrial was required  
6 by manifest necessity. United States v. Bonas, 344 F.3d 945 (9<sup>th</sup> Cir. 2003). Whether there was  
7 manifest necessity is an exercise in discretion, which is reviewed on appeal for abuse of  
8 discretion. The issue will be whether the finding of manifest necessity for a mistrial “is one that  
9 a rational jurist could have made based on the record presented to him.” Id. at 948. There are  
10 degrees of necessity, and the degree of deference to be given the trial judge’s decision varies  
11 according to the circumstances of each case. Arizona v. Washington, 434 U.S. 497 (1978).

12 In United States v. Williams, 717 F.2d 473 (9<sup>th</sup> Cir. 1983), for example, defense counsel had to  
13 withdraw after the jury had been empaneled for a conflict. The court’s order finding manifest  
14 necessity was upheld on appeal, because new counsel had to be appointed, necessitating a  
15 lengthy delay such that it was unlikely the same jurors would be available to resume trial.

16       Whether an instruction to the jury to disregard a witness’ testimony will be adequate was  
17 addressed in Bruton v. United States, 391 U.S. 123 (1968). The Court held that where the “risk  
18 that the jury will not, or cannot, follow instructions is so great, and the consequences of failure  
19 so vital to the defendant, that the practical and human limitations of the jury system cannot be  
20 ignored.” Id. at 135-36.

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The government acknowledges that Agent Kline's testimony was extensive. It believes, however, that instructing the jury to disregard his testimony, and re-presenting it through other agents, is preferable to a mistrial.

Respectfully submitted this 23<sup>rd</sup> day of June, 2008.

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By: /s/ Karon V. Johnson  
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